

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE

In re:

No. 94-13953  
Chapter 7

JERUSHA LYNN FLOYD

Debtor

MICHAEL K. FLOYD

Plaintiff

v.

Adversary Proceeding  
No. 95-1081

JERUSHA LYNN FLOYD

Defendant

**MEMORANDUM AND ORDER OVERRULING**  
**DEFENDANT'S MOTION TO DISMISS**

On August 28, 1995, Jerusha Lynn Floyd filed a motion to dismiss the complaint on the grounds that the complaint was not timely filed. The motion was accompanied by a brief reciting facts and law in support of the motion.

The plaintiff, Michael K. Floyd, has not filed a response as required by LOCAL R. BANKR. P. 9(c), which also provides:

“A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion.”

No affidavits were filed in support of the motion. No depositions have been filed by either party. No answers to interrogatories are on record. No admissions are on file. The parties have not stipulated the facts of the case. Rule 56 of the FED. R. CIV. P. which applies in adversary proceeding pursuant to BANKR. R. 7056 provides:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The plaintiff asserts that the debt sought to be declared non-dischargeable is a debt excepted from discharge by 11 U.S.C. §523(a)(5). Such a debt is not subject to the limitations of 11 U.S.C. §523(c)(1) and BANKR. R. 4007(c).

On the other hand, Jerusha Lynn Floyd, asserts that the debt is not of the kind described in ¶5 of §523(a). Thus, argues the defendant, this adversary proceeding should have been filed not later than sixty (60) days following the first date set for the meeting of creditors held pursuant to 11 U.S.C. §341(a), which it clearly was not. BANKR. R. 4007(c).

If the defendant has correctly characterized the debt, then she is entitled to a dismissal of this adversary proceeding. Unfortunately, there has been absolutely no evidentiary material filed upon which the court can make a determination whether the characterization is correct. Accordingly,

It is ORDERED that the defendant's motion to dismiss plaintiff's complaint for failure to timely file is overruled.

ENTER:

BY THE COURT

entered 9/20/1995

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R. THOMAS STINNETT  
U.S. BANKRUPTCY JUDGE